No. 10,190

United States Circuit Court of Appeals

For the Ninth Circuit

STERLING CARR, as Trustee in Bankruptcy of NIPPON YUSEN KABUSHIKI KAISYA, a Corporation, Bankrupt, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,

Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD., a Corporation, and J. M. ANDERSEN,

Appellees.

(And Fourteen Consolidated Appeals.)

Appellants' Brief In Reply to Appellees' Petition for a Rehearing

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I.

PRELIMINARY STATEMENT.

Before addressing ourselves to a direct reply to appellees' petition for a rehearing herein we feel it in order to make the following statement as a preliminary thereto:

This case, so far as the decision of this Court has rested liability upon appellees, is one in which antagonistic social and economic interests are involved. There is first the interest of society in preserving and protecting life and property while on the high seas or other navigable waters from undue hazard or risk of loss or injury when consideration is given to such scientific or engineering progress as may be of use or value in their protection or preservation. There is second the economic interest of those who invest capital in shipping enterprises or other business pursuits carried on upon navigable waters.

To the former of these interests—the social interest—it is important that some reasonable consideration be given. To the latter it is equally important that consideration be given else the requirements of safety measures may become so burdensome in the interest of the former that trade and commerce will be strangled.

It is our conception that, in attempting to secure a proper balance and accommodation of these antagonistic interests with flexibility in administration, the Congress, with respect to vessels of the United States, has for well over a half century rested the power to make rules and regulations of national scope and significance in the Board of Supervising Inspectors and of local scope and significance in the control of the Local Inspectors. The latter's control is subject to redress by appeal and probably even to mandamus proceedings if exercised capriciously or in arbitrary manner. (*Williams v. Molther, infra.*) It is probably true that no unsinkable ship can be built. It is inescapable, however, that one vessel of particular design or construction will survive under conditions of wind,

wave, or contact which would result in the loss of another of different design or structure.

The economic motive is to obtain profit through low operating costs. Expenditure of capital is the indispensable concomitant of protection of life and property at sea. So long as a shipowner is able to secure protection through insurance, incorporation, or statutes limiting liability, he will, unless regulated, operate his vessels as cheaply as he can. The laws of the United States have, perhaps in measurable degree in derogation of our economic interests as a commercial nation, long attempted, through express enactment and delegation of rule-making power, to secure safety of life at sea.

In the case before this Court, the rule-making power conferred upon the Local Inspectors by Congress is challenged when that rule-making power was exercised and directed towards the avoidance of the very type of catastrophe which occurred. As such rules were flouted by the Olympic II's owners as she lay afloat, anchored stem and stern in dense fog across the courses of vessels to and from Los Angeles Harbor, it is, after her loss and the loss of life and property occasioned by her non-compliance with such regulations that those losses are sought to be evaded by her counsel's able presentation of nice technicalities of waiver and invalidity.

In the circumstances, and in giving consideration to the weight and merits of the arguments of appellants' petition for rehearing and that of appellees, we respectfully request the Court to consider carefully the consequences of a decision which might lessen, weaken or avoid

the authority of an administrative body of experts to deal promptly and effectively with abuses dangerous to life and property and cast upon the Congress the entire burden of the regulation of such subjects as these, which are of a highly technical and specialized nature.

II.

THIS COURT DID NOT ERR IN REVERSING THE ALLEGED FINDING OF THE DISTRICT COURT THAT THE REQUIREMENTS OF THE INSPECTORS WERE NOT IN FORCE ON SEPTEMBER 4, 1940.

While there is much argument under "Point I" of appellees' petition which is properly related to and more fully developed in subsequent points, we shall here, in the interest of clear presentation, devote ourselves to the main argument presented. As we understand that argument it is simply this: The decision of this Court reversed a fairly implied finding of the District Court that a reasonable time had been given Olympic II to comply with regulations (conceded argumentatively to be valid) and that such time had not expired on September 4, 1940, when the loss of life and property and injury to persons occurred.

It is not disputed that the requirements were made known to the Olympic's owners on June 3, 1940, when the fishing season was in its incipiency. It is not disputed that on July 24, 1940, Commander Field, Director of the Bureau of Navigation in Washington, addressed a letter to Olympic's owners wherein they were advised that the

action of the Local Inspectors in imposing the challenged requirements and the action of the Supervising Inspectors in affirming them was correct. The appeal was denied in express words, the Director of the Bureau stating that he had reviewed the requirements and was "of the opinion that such requirements are reasonable and generally *necessary to adequately ensure the safety and protection of the patronizing public.*"* The letter concludes that the action of the Local and Supervising Inspectors is "hereby sustained." There is no hint in that letter of any extension of time to Olympic. (Ap. II, pp. 744, 745) As to whether such requirements were intended to be in effect forthwith we call attention to this further passage from the same letter:

> "The statutes further provide that until this standard is fully complied with the Local Inspectors are not authorized to issue a certificate of inspection to any such vessels."

Yet in their brief counsel state that the Olympic still had a reasonable time, and Olympic if inspected on September 4, 1940, "would have satisfied the inspectors and would have passed and received her certificate". (Pet. p. 5) Patently she would not unless the Local Inspectors or Supervising Inspectors were prepared to override the mandate of the Director of the Bureau in dismissing Olympic's appeal wherein he stated that *"until this standard is fully complied with the Local Inspectors are not authorized to issue a certificate of inspection to any such vessels"*.

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*Emphasis supplied throughout.

If it be assumed that there was any burden upon us to establish that the regulations were in force prior to September 4, 1940, the above evidence amply sustained it.

The evidence relied upon to the contrary is an alleged conversation between Captain Fisher and Captain Andersen of Hermosa. The testimony of Captain Andersen as to this conversation and the scope of any relaxations covered by it is extremely vague. (Ap. I, pp. 402-404) Whether it occurred before or after the denial of Hermosa's appeal and the direct ruling of the Director that no certificates should issue in the absence of compliance, is undisclosed. If before, it would appear to be superseded by the appeal, and if after, a toleration which an inferior government functionary was without authority to indulge. Be all this as it may, we have Captain Fisher's letter stating he had no record or recollection of the matter, and what is more important closely following the accident, as counsel point out on page 11 of their brief, Captain Fisher, Captain Alger and Miss Phillips' report to the Bureau indicated such regulations were in effect when the collision occurred. The only person who it is claimed relaxed any requirements was Captain Fisher. Commander Field's recital that a reasonable time had been allowed for the Olympic to comply is completely belied by his own order that certificates be not issued without compliance. It was obviously not written in contemplation of any litigation, and could serve only to whitewash departmental laxness in complying with the Director's own order of July 24, 1940. (Ap. II, p. 744) We are criticized for not calling the Local Inspectors. There is nothing in the record to indicate the Local Inspectors relaxed their requirements.

The letter accompanying the minimum requirements for the Olympic (Ap. I, pp. 390, 391) was peremptory that if she "was found operating in such service without inspection and certification" the consequences of the law would be visited upon her. If we assume that, as a matter of grace, the Local Inspectors granted a reprieve pending the Olympic's appeal to the Supervising Inspectors and that the latter granted a like reprieve pending appeal to the Director, the fact remains that, so far as departmental action was concerned, any remedy of the Olympic had been fully exhausted on July 24, 1940.

We think it is abundantly clear that Olympic did not sustain the burden of showing that the requirements of June 3, 1940, were not in force on September 4, 1940. If we assume that, in the nature of things, a reasonable time after July 24, 1940, was allowable, it is certainly the fair conclusion from petitioners' own showing that Captains Fisher and Alger, as well as the Department of Justice representative, thought it had expired. (Pet. p. 11) Commissioner Field's recital is evasive and does not state the opposite conclusion. In fact, he concludes with the recommendation that the report of the A Board "be accepted". But giving to Commander Field's letter all the weight which petitioners ascribe to it, the record clearly shows that the vote of those in a better position than he to know whether there was waiver or relaxation was *three* to *nothing* against him.

In considering in the specific case of the Olympic what was a reasonable time, we believe the Court will also bear in mind the fact that her last certificate had been taken from her over one year before the minimum requirements

were imposed. (Ap. I, pp. 371-374; Ap. II, p. 741) The evidence on these points is almost wholly documentary, and under such circumstances the presumption of correctness of the trial court's determination does not obtain.

We respectfully submit that "Point I" of appellees' petition herein is devoid of merit. It is inconceivable that the reasonable length of time should be co-extensive with the fishing season when the requirements were imposed at its very beginning and were coupled with the express warning that, if the vessel were, after June 3, 1940, "found operating in such service without inspection and certification", she would be "duly reported" for violation of statute.

III.

THE REQUIREMENTS OF THE LOCAL INSPECTORS WERE VALID.

Counsel for petitioners contend that the requirements imposed by the Local Inspectors, approved by the Supervising Inspectors and by the Director of the Bureau were invalid. We believe that this argument rests in a complete misconception of the navigation laws of the United States. Those laws do not place all rule-making power in the hands of the Board of Supervising Inspectors, and do not even make their effectiveness in all cases depend upon approval of the Secretary of Commerce. It is perfectly true that under various sections of the Code the power is so lodged and its exercise so to be approved before it is effective. (46 U.S.C.A., Sec. 375) Under other

statutes, rules prescribed by the Board of Supervising Inspectors need not have the approval of the Secretary of Commerce to become effective.

46 U.S.C.A., Sec. 381.

What rule-making power has been reposed in the Supervising Board and the manner of its execution has, however, absolutely nothing to do with what power is reposed in the Local Inspectors functioning in their proper sphere.

By Congressional enactment, powers are expressly granted to local boards. Thus the judgment of the local board determines what crew is necessary for safe navigation.

46 U.S.C.A., Sec. 222.

Under Section 395 of the same title, Local Inspectors are required to satisfy themselves that vessels subject to inspection are of suitable structure. By its decision herein, this Court gave such statute the same realistic treatment which it received from the Circuit Court of Appeals for the Seventh Circuit in

Leathem-Smith-Putnam Nav. Co. v. National Union Fire Ins. Co. (1938) 96 F.(2d) 923 (C.C.A. 7).

In that case, the Inspectors authorized structural changes designed to convert a gravel carrying vessel into a sand-sucker if made in a particular fashion. The owners did not follow these requirements, though representing that they had done so. The vessel was lost and recovery upon an insurance policy requiring the due diligence of the owners was denied. The findings of the District Judge

are quoted and approved in the Circuit Court of Appeals decision. He found:

> "Inasmuch as libelants failed to comply with the regulation, they had the burden of showing that their default did not contribute to the disaster and did not meet the burden."

In that case, as here, the Local Inspectors and the Bureau were endeavoring to do their job and protect life and property. There fifteen lives were lost because the owners wanted to save money. Here eight were lost because of the same consideration. If this Court should not also deal with such regulations in the same resolute and realistic manner as did the Seventh Circuit, more lives will be lost and more property destroyed in marine disasters.

We submit that realistic construction of Section 395 of Title 46 U.S.C.A. requires that when a vessel is inspected, the Local Inspectors state in concrete terms what is required of her to be certificated. Imagine the state of affairs if the Local Inspectors were to state simply their conclusion that a particular vessel could not be navigated in her proposed trade with safety to life and property, leaving it to the owners to guess what steps they would take to improve the vessel before again submitting her to inspection. That is precisely the sort of administration of law which counsel for the Olympic II appear to contend is proper.

Nor is it any answer to say that Local Inspectors of different ports may prescribe different regulations for vessels of substantially the same character. The San Francisco Local Inspectors might well think that a sister ship of Olympic II could be anchored in Carquinez Straits

and engage in the same trade as the Olympic without the same structure being required of her. We have continuously emphasized the exposed position of the Olympic and the fact that San Pedro Bay is substantially an open roadstead. A breakwater was essential to convert a portion of it into a harbor. Moreover, the very appeals which Olympic herself took in connection with the requirements is ample proof that lack of uniformity may be corrected in any proper case. The danger of arbitrary action is fancied, not real.

The Local Inspectors were not ignorant of Olympic II's structure when they promulgated their minimum requirements. The blueprint of the vessel which was submitted to the inspectors was produced in the trial court by appellees. (Ap. I, p. 351)

Thirty-five years ago this Court itself recognized the binding force of the requirements of a full complement of officers and men as prescribed by the Local Inspectors in

> *Northern Commercial Co. v. Lindblom* (1908) 162 F. 250, 254 (C.C.A. 9).

While that case did not involve a collision, the Court expressly pointed out that the complement of crew should be adequate to all the exigencies of the voyage. See:

> *Texas Co. v. National Labor Relations Board,* (1941) 120 F.(2d) 186, (C.C.A. 9).

Prior to 1908, the power to fix the complement of officers and crew had been lodged in the Supervising Inspectors. After an expression of opinion by the Attorney General (25 Op. Atty. Gen. 56) that the power so lodged could not be delegated to the Local Inspectors, the Con-

gress amended the statute making an express delegation of power direct to the Local Inspectors. Whether the Local Inspectors exercise their power pursuant to Section 222 or pursuant to Section 395, we submit that the requirements imposed by them have the force of law.

In arguing their case, appellees point to no Congressional enactment or Rule or Regulation of the Board of Supervising Inspectors with which the requirements of the Local Inspectors here involved are inconsistent.

We respectfully submit that where a statute, as does Section 395, confers upon a local body the duty of withholding license unless satisfied that a vessel can be safely navigated, the very purpose of the Congress in enacting such statute would be frustrated if such local board must simply state, "You may not have a certificate for your vessel." Simplest logic requires that reasons be stated. When stated, they become statutory requirements subject to review in the manner in which the Olympic reviewed them. Any other view would invite such chaos that commerce would be paralyzed.

We submit that it is abundantly clear that ample statutory authorization to Local Inspectors to impose requirements, not inconsistent with rules of a higher authority, flows from the duty to satisfy themselves that a vessel may be safely navigated. Judicial means exist for abuse of such power in a particular case. (*Williams v. Molther, infra.*) No abuse is shown here. Quite the contrary; the very things the inspectors foresaw came to pass.

We cannot here undertake a comparison of the requirements imposed upon the Olympic II as compared with those imposed upon other vessels. We do, however, feel

that the action of the Local Inspectors, approved as it was by the Supervising Inspectors and by the Director of the Bureau, affords reasonable evidence that counsel's *ex gratia* statement that the requirements are more drastic than for any class of vessels afloat is a gross overstatement. (Br. p. 17) We repeat that while appellees' proctors make many general statements in connection with the inspectors' requirements, they point to no rule, regulation or statute with which such requirements are inconsistent. To say that when a situation is known, imposition of requirements must await formal submission to inspection, and that such requirements are nullities if the owner neglects to conform to his duty to present his vessel, appears to us palpably absurd.

It is not disputed by us that Congress might pass a statute which would be a binding guide upon the local boards. Congress has not done so. Accordingly, all the examples posed on pages 18 and 19 of appellees' petition have no pertinency whatsoever.

The decision in

Williams v. Molther (1912) 198 F. 460, 464 (C.C.A. 2)

is put squarely upon the ground that the rule of the inspectors was "a direct contradiction of section 4442" of the Revised Statutes. If there be statutory contradiction of the requirements here imposed, it is not pointed out. The statute there involved required the Local Inspectors to give the examination for pilot's papers to any person claiming to be qualified. Counsel here state:

> "Bulkheads are *not required* by law as a condition to granting a certificate of inspection, and certainly

> local inspectors are without power arbitrarily to impose such requirements as a condition." (p. 21)

Counsel point to no statute, however, which provides that bulkheads may not be required of vessels by Local or Supervising Inspectors pursuant to powers delegated to them by the Congress. If their main argument be sound, how are the inspectors to satisfy themselves that any vessel can be safely navigated in any designated trade? If the steamboat inspection service is to be rendered impotent, why not abolish it entirely?

We are not here concerned with express statutory limits on Congressional delegation of power as in

> *United States v. Miller* (1886) 26 F. 95, 97 (S.D.N.Y.),

and

> *The Eleanora* (1877) Fed. Cas. No. 4335 (C.C.N.Y.).

We are concerned with a case where the delegation is unrestricted so far as concerns the matters specified in the inspectors' requirements as affirmed on appeal. See:

> *Belden v. Chase* (1893) 153 U.S. 674, 14 S.Ct. 264, 37 L.Ed. 1218, 1227.

And consider

> *Deslions v. Compagnie Generale Transatlantique* (1907) 210 U.S. 95, 28 S.Ct. 665, 52 L.Ed. 973, 990, 991,

where, in a unanimous decision, Mr. Chief Justice White strongly intimates that powers delegated in respect to life-saving equipment are so abundant as to supersede express Congressional enactment on the subject. He said:

> "The argument is that, although all the things just stated be true, yet, as the statute, when closely considered, required a greater capacity of lifeboats and rafts than was exacted by the regulations, the statute, and not the regulations, must be considered in determining the sufficiency of the equipment. But we think this is completely answered by the context of the statute, and especially by Section 4405, which gives to the regulations of the board the effect of law."

There is absolutely nothing but the unsupported suggestion of counsel's brief to sustain the proposition that the Local Inspectors, the Supervising Inspectors and the Director, in their consideration of the requirements laid down for the Olympic II, did not consider all acts of Congress, all rules and regulations having the force of law and all customary standards for construction of vessels exposed to the marine risks to which the Olympic II was exposed. It is clearly to be presumed that official duty was performed by officials charged with such duty.

IV.

APPELLEES' BRIEF IS INCORRECT IN STATING THAT THE BURDEN OF THE PENNSYLVANIA RULE HAS NEVER BEFORE BEEN IMPOSED UPON A VESSEL FOR BREACH OF REQUIREMENTS IMPOSED BY LOCAL INSPECTORS.

Before developing the matters stated in the foregoing heading, we should point out that appellees' brief is replete with protestations of injury because the so-called Pennsylvania rule was imposed upon the Olympic II by

the decision herein. It is unquestionably true that the language of the opinion imports the applicability of that rule. However, the decision itself is predicated upon a quotation from the opinion expressed by Olympic's own expert that she would have remained afloat longer with proper bulkheads as prescribed. Thus it is patent that it was proved at the trial that the absence of bulkheads *was contributory.* No presumption need have been indulged in these circumstances. Indeed, bearing in mind the opinion of the Local Inspectors, the Supervising Inspectors and Director Field, the Court might as well have rested its decision directly upon the overwhelming evidence of these disinterested experts that the Olympic was unseaworthy for the calling in which she was engaged. That alone would be ample to convict her of equal liability for loss of life, loss of property aboard her and for personal injuries suffered by her passengers. It is entirely clear that unseaworthiness of the character here disclosed might be held sufficient to eliminate any fault of the Sakito Maru in the chaim of causation which assumed negligence of that vessel first set in operation. Authorities upon this point were called to the attention of the Court on pages 55 and 56 of our opening brief, and we shall not prolong this memorandum by further reference to them at this point.

Referring now to the main topic of this subdivision of our memorandum, we refer to the decision of the Circuit Court of Appeals for the Second Circuit in

The New York Marine No. 10 (1940) 109 F.(2d) 564, 566 (C.C.A. 2).

This case involved a cause of collision in which limitation of liability was sought. It was pointed out that the charterer was liable in full "if it is held that the absence of a second deckhand was a cause of the accident." Swan, C. J., then observes:

> "Since the absence has been found, and the lack is admitted to be a statutory fault, (see 46 U.S.C.A. §§222, 362 and 405) it is presumed that the fault is a contributory cause, and the petitioner must bear the burden of showing that it was not. The Pennsylvania, 19 Wall. 125, 136, 22 L. Ed. 148; The Albert Dumois, 177 U.S. 240, 254, 20 S.Ct. 595, 44 L. Ed. 751; Lie v. San Francisco & Portland S.S. Co., 243 U.S. 291, 298, 37 S. Ct. 270, 61 L. Ed. 726; The Annie Faxon, 9 Cir., 75 F. 312, 319; McGill v. Michigan S.S. Co., 9 Cir., 144 F. 788, 795, Certiorari denied, 203 U.S. 593, 27 S. Ct. 782, 51 L. Ed. 332; The Suffolk, 2 Cir., 258 F. 219; The Fulton, 2 Cir., 54 F.(2d) 467, 469; The Annie (D.C.) 261 F. 797, 799."

It will be noted that the Court cites the provisions of Section 222 of Title 46 of the United States Code. That section is one which forbids navigation unless a vessel, subject to the inspection laws, shall have:

> "in her service and on board such complement of licensed officers and crew including certificated lifeboat men, separately stated, as may in the judgment of the *local inspectors* who inspect the vessel be necessary for her safe navigation."

Thus, the undermanned vessel held at fault in the above case had her complement of crew fixed by the Local Inspectors, and the Circuit Court of Appeals for the Second Circuit cited and applied the rule of *The Pennsylvania*

against her. The *requirements* of the Local Inspectors prescribed pursuant to statute were given the force of *law*.

We do not understand, however, that this Court, in making specific reference to bulkheads alone and in pointing out the testimony of appellees' expert in regard thereto intended to limit its decision to that phase of non-compliance alone. Olympic did not satisfy her burden in respect to any of the requirements of the Local Inspectors set forth in Apostles I, pp. 392-401. By singling out from this group one item in respect to which the proof actually preponderated *against* the Olympic, we do not understand that the Court did more than make one specific reference to a condition which was general on the whole record before it. Thus, subdivision 38 (Ap. I, p. 401) required Olympic to have:

> "Minimum crew while vessel is at anchor with persons other than crew on board:
>
> 1 licensed master
> 1 licensed engineer
> Sufficient certificated lifeboatmen to adequately launch and man all lifesaving equipment, 65% of which shall be able seamen."

There were persons on the Olympic other than the crew at the time of this disaster. A number of them lost their lives. But Olympic had no licensed master or engineer aboard. She had one ordinary seaman.

There is express adjudication that the Pennsylvania rule applies when the manning requirements of the *Local* Inspectors are not met. Olympic had no master or en-

gineer, nor did she prove that she had a single certificated lifeboat man on board.

In singling out only the one of the forty-two requirements of the inspectors which this Court expressly mentioned in its opinion, we believe that Olympic's counsel have utterly misconceived the scope of the opinion, and have attempted to particularize this case and the Court's decision to the one example mentioned in its opinion. Counsel give no recognition to the broader aspects and implications of the opinion. They do not even attempt to show that the other forty-one requirements of the inspectors were met or argue that any thereof were beyond the power of the Local Inspectors to impose.

The statement on page 27 of Olympic's petition that: "Olympic, struck by Sakito as she was struck, would have gone to the bottom *at the same identical moment* by the inevitable laws of physics" (Pet. p. 27), is only an example of counsel endeavoring to "expert" their own case. The testimony of Captain Wilver produced by Olympic at the trial which this Court quotes in its opinion establishes that her fault was contributory. Olympic could only have been certificated had she had bulkheads pursuant to lawful requirements imposed upon her. Without bulkheads, she sank almost immediately. The decision in the case of the Material Service, supra (Leathem-Smith-Putnam Co. v. National Union Fire Ins. Co.) is clear authority that even a certificate would not have availed the Olympic as an excuse if her structure had not in fact met all requirements. Structure, not certification, is the real test. Certification without structure would have availed the Olympic nothing. Structure, regardless of cer-

tification, would have absolved her unless the Court shall find her guilty of other fault as urged in our petition for a rehearing herein.

We submit that the decision of this Court discloses no error of law of the nature attributed to it under "Point III" of appellees' petition, that the opinion is supported by ample authority and that it is not a departure from the Pennsylvania rule.

V.

THE QUESTION OF LEGAL CAUSE IN DETERMINING RESPONSIBILITY FOR LOSSES TO THIRD PERSONS AND THEIR PROPERTY ON BOARD THE OLYMPIC II.

Arguments that Olympic's defaults were not contributory to the loss are inserted somewhat at random throughout her brief. They are, however, largely concentrated under "Point IV", and we shall make our principal answer to them here.

It appears to us that each argument and illustration overlooks the fundamental fact that Olympic II's owners owed a continuing duty to her patrons to keep her in a seaworthy condition and to conform to the bulkhead, manning and other requirements set for her by the Federal authorities. That duty was not suspended at the moment the approaching Sakito struck the Olympic. It might be non-operative as a legal cause if the Sakito Maru would certainly have sunk the Olympic II in precisely the same length of time. Then we might have a case of true intervening cause. But even Olympic's own expert thought bulkheading would have kept the Olympic afloat longer.

How long he did not say. This Court did not resolve that testimony against the Olympic II, but in her favor. It migh well have decided that proper construction and manning would have permitted Olympic and all of her passengers and crew to have escaped injury other than that inflicted by the impinging force of the stem of the Sakito Maru into her port side.

Had the Court so determined the matter, and we believe there was ample evidence in the record so to do, the limit of Sakito's liability would have been the amount it would have cost to fit new plates into the side of the barge. All other losses, whether to the owners of the Olympic, to her patrons, to her crew, or to persons having property aboard her would have been for the sole account of Olympic II.

When it was established, as the Court's opinion herein shows, that the Olympic II breached at the very moment of collision a continuing duty she owed to her patrons, crew and property carried on her, which breach proximately contributed to the losses they suffered, we are at a complete loss to see how counsel's arguments that the faults of the Olympic were a *condition* and not a *cause* of disaster has any validity whatsoever.

Whatever may be the rule at common law as to a tortfeasor being required to take his victim as he finds him and make restitution accordingly, that rule could extend even at common law only to the Olympic, not to her patrons. There is very strong authority that the common law rule has no application in admiralty at all. If it has not, Olympic should be made to pay all damages, exclusive of her own loss, and such loss should be equally

divided. This was the rule applied by the Fifth Circuit Court of Appeals in the Agnella-Jordan collision at the outer station off Mobile bar.

Walaas v. Johnson (1913) 204 F. 440 (C.C.A. 5).

The Jordan was an old pilot boat built in 1883 (six years later than the Olympic II, and sunk some 30 years earlier) when struck by the Agnella. The Court allowed her half damages, stating:

> "In the case of The Young America, Judge Brown, of the Southern District of New York, held that, where the evidence showed that the damages were as much due to defects in the injured vessel as to the negligence of the other, the damages should be equally divided. The Young America (D.C.) 54 Fed. 410. It was held in The Atlanta (D.C.) 34 Fed. 918, that where the injured vessel was old and weak, and consequently damaged more than a boat in ordinary condition would have been, she should be entitled to recover only half damages."
>
> * * * * * * *
>
> "It is not just that the owners of this old boat should continue her in service with her concealed infirmities until an accident compels repairs or rebuilding, and then recover as for a total loss at the expense of others. The Howard (D.C.) 30 Fed. 280; The Quaker City (D.C.) 19 Fed. 141."

In

The John R. Penrose (1898) 86 F. 696 (E.D. Pa.),

the commissioner had allowed full damages against the colliding vessel for replacement of an unseaworthy bowsprit on the other. Judge Butler stated:

> "The vessel was unseaworthy in this respect, and should not have gone out until repaired. * * * She was in fault therefore in going out in such condition. * * * Under the circumstances, I will treat both parties as in fault to this extent, and will allow the libelant one-half the costs, * * *."

Similarly, we note the fragmentary report of Judge Knight's decision in

The Viking (W.D.N.Y.) 1932 A.M.C. 1159.

Viking was old and her beams and strakes were corroded. The Court said in part:

> "It seems to me that it is in line with many authorities under comparable situations, and fair to libelant and respondents, that libelant should have damages only to the extent of one-half of the cost of these repairs as against the tug Nat Sutton."

Accord:

The Smedley (1914) 216 F. 926 (S.D.N.Y.) (Hazel, D. J.);

The Syracuse (1883) 18 F. 828 (S.D.N.Y.) (Brown, D. J.).

We submit that each of the foregoing authorities demonstrates that Olympic II's unseaworthiness and breach of requirements were not mere conditions, but proximate causes of the losses sustained by her passengers to whom she owed the duty to maintain herself in staunch and seaworthy condition and to obey all requirements of the regulations for safety of everything on board entrusted to her care. Indeed, we think this Court might well have applied like principle to the loss of the Olympic II herself.

VI.

CONCLUSION.

In concluding this memorandum, we wish again to call to the attention of the Court the fact that the opinion herein mentions only claims for loss of life and personal effects. We accordingly repeat the request made in our petition for rehearing that, should a rehearing be denied, the opinion or mandate be made to exhibit the clear intention of the Court that personal injuries claimed by those on board the Olympic and claims of third persons for loss of personal property on board the Olympic, other than personal effects, are within the ambit of claims subject to a division of damages as between Sakito and Olympic.

We respectfully submit that the petition of appellees herein for a rehearing of this cause is devoid of merit and should, therefore, be denied.

Respectfully submitted,

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September 1, 1943.